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In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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1. The jurisdictional question presented in this case concerns the role of the Federal Communications Commission in effectuating Congress's intent to open the nation's $100 billion local telephone markets—rapidly, and on a national scale—to full-blown competition. We observe in our petition, and respondents have not denied, that the decision below marks the first time that any court has held that the substantive scope of federal telecommunications law exceeds the scope of the FCC's regulatory authority to implement it. That decision is wrong, and, unless corrected by this Court, it will irreversibly convert the 1996 Act, designed as a catalyst for immediate competition, into an engine of duplicative and obstructionist litigation.

a. Despite the efforts of some respondents to compartmentalize the jurisdictional issue in this case, the court

of appeals made clear that its various holdings on that issue rested on the same three essential grounds. Those were, *first*, an unwillingness to recognize Section 251(d)(1) as an explicit declaration of the Commission's authority to "implement the requirements of this section"; *second*, a belief that the Commission's general regulatory authority under Section 201(b) is confined to exclusively interstate matters, even though the text of that provision imposes no such limitation; and, *third*, an expansive interpretation of Section 2(b) based on the assumption, repudiated by other federal circuits, that the local network is "fundamentally intrastate in character" (Pet. App. 22a). See *id.* at 11a-24a, 29a-30a, 35a-36a, 83a-86a. Those three premises led the court to hold, with clarity and astonishing breadth, that the Commission's regulatory jurisdiction is confined to implementation of the scattered substantive provisions that themselves "mention" (*id.* at 85) the Commission by name. *See id.* at 12a n.10, 29a n.23, 37a.

As discussed in our petition, that holding is incorrect, and it leaves Section 251 riddled with interpretive anomalies that respondents cannot resolve.[1] For example, in denying that either Section 201(b) or Section 251(d)(1) grants the Commission authority to implement Section 251, respondents relinquish any explanation for the Commission's authority, presumed but not granted in Section

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[1] Equally unavailing is respondents' effort to justify the court's pricing determination by pretending that "[t]he Act's substantive pricing standards are in section 252(d), not section 251." Regional Bell Opp. 14 n.6. In fact, the Act's pricing standards appear in both Section 251(c) and Section 252(d). At bottom, respondents argue that a state commission's specific obligation to adhere to Section 252(d) when arbitrating open rate issues, see 47 U.S.C. 252(c)(2), somehow cancels out its general obligation, applicable to "*any* open issues," to conform its disposition to "the requirements of section 251, *including the regulations prescribed by the Commission pursuant to section 251*." 47 U.S.C. 252(c)(1) (emphasis added); see Regional Bell Opp. 13-14; GTE Opp. 16. That argument rests on the tacit and self-refuting premise that "open rate issues" are not "open issues." See also Fed. Pet. 16 n.6 (discussing Section 252(d)).

251(d)(2), to implement the non-pricing provisions of Section 251(c)(3). See Regional Bell Opp. 19. Nor can respondents explain why Congress barred the Commission from preempting only those state policies that are "consistent with the requirements of this section" *and* "do[] not substantially prevent implementation of the requirements of this section and the purposes of this part," 47 U.S.C. 251(d)(3), unless the Commission, like other agencies, retains general authority to interpret its organic statute. See Fed. Pet. 13-14.

In short, only the Commission's understanding of its statutory role—an understanding that affirms the complementary roles of state and federal authorities in implementing the Act, see Fed. Pet. 15-16[2]—can fit the provisions of the 1996 Act together to form a coherent whole. But even if there were some other way to confer independent significance on those provisions, and respondents have identified none, the proper entity to choose among those competing interpretations would not be a regional court of appeals selected by lottery, but the agency to which Congress has always turned for implementation of the substantive terms of federal telecommunications law. See *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 380-381 (1988) (Scalia, J., concurring in the judgment).

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[2] Respondents suggest that the Commission's approach would deprive the States of an important role in implementing the local competition provisions. That is not so: few tasks, for example, require as much expertise as the determination of the forward-looking economic costs of an efficient network, an inquiry that, under the FCC's rules, belongs to the state commissions. To support their own position that state commissions need *no* guidance in implementing the 1996 Act, some respondents suggest that, before enactment of that statute, a number of state commissions had succeeded in regulatory initiatives to open local markets to competition. That is incorrect, as should be apparent from our unrebutted observation that, even today, incumbent monopolists receive about 98% of local revenues and the overwhelming majority of Americans still have no choice of alternative local carriers.

There is also no merit to respondents' contention that Section 2(b) of the Communications Act of 1934 alters the Commission's express authority to implement the local competition provisions of the 1996 Act. Respondents concede that, in the 1996 legislation, Congress subjected local telephone markets, for the first time, to extensive regulation under federal law, despite Section 2(b)'s prohibition on "construl[ing]" the substance of federal law "to apply" to intrastate matters. Respondents nonetheless read the text of Section 2(b)—"nothing in this [Act] shall be construed to apply *or* to give the Commission jurisdiction with respect to" intrastate matters, 47 U.S.C. 152(b) (emphasis added)—to limit the scope of the Commission's authority more than it limits the substantive reach of federal telecommunications law. See Regional Bell Opp. 15.

Even apart from the explicit provisions of the 1996 Act reaffirming the Commission's regulatory authority, see Fed. Pet. 17-18, that argument lacks merit. By its terms, Section 2(b)'s rule of construction applies equally to the substantive scope of federal law and to the Commission's authority to implement it; indeed, Congress could not have meant to distinguish between the two, because when Section 2(b) was enacted in 1934, federal law did not govern intrastate communications. Section 2(b) refers to the Commission's authority as well as to the applicability of federal law *not* because Congress wished to detach the scope of one from the scope of the other, but because Congress intended to bar the Commission from exercising its "ancillary" jurisdiction, see generally *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 172-178 (1968), over intrastate matters that may be loosely related to implementation of the Act but to which the Act itself does not clearly extend. See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986); see also *Houston, E. & W. Texas Ry.* v. *United States*, 234 U.S. 342 (1914) (*Shreveport Rate Case*). As the court of appeals recognized (Pet. App. 19a), that concern, which led to this Court's jurisdiction-re-

strictive decision in *Louisiana*, is absent here. *Louisiana* nowhere suggests that the Commission's authority is narrower than the scope of federal telecommunications law, and, until now, no court had ever so held.

Finally, respondents' extensive reliance on Section 2(b) underscores the extent to which their reasoning, and that of the court of appeals, departs from the decisions of the Fourth and District of Columbia Circuits, which have recognized the Commission's authority to regulate aspects of the local telephone network that are inseparably interstate and intrastate in character. See Fed. Pet. 19-22. The core regulatory subjects of the local competition provisions—*e.g.*, the rates for network interconnection and unbundled elements—fall squarely within that category. Respondents contend (*e.g.*, Regional Bell Opp. 15; State Comm'n Opp. 12 n.20) that the Commission never relied on that ground in the First Report and Order and may not rely upon it now. That is incorrect. As we have noted (see Fed. Pet. 20), the Commission did in fact determine that the logic of the Act does not permit "separating" the interstate and intrastate components of the local exchange network for purposes of implementing the local competition provisions. See Pet. App. 194a-195a. Indeed, during the rulemaking proceedings, "[n]o commenters support[ed]" the creation of such a regime, *id.* at 195a, and it is therefore respondents who are now barred from belatedly questioning the Commission's determination.

b. Respondents are profoundly mistaken in claiming that the jurisdictional issue in this case "raise[s] no issue of national importance" (Regional Bell Opp. 11), a claim they base on the contention that many state commissions have voluntarily followed the FCC's approach on certain methodological issues that the Eighth Circuit deemed beyond the Commission's jurisdiction.[3] It is true that a

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[3] Respondents make no effort to resolve the tension between that contention and their claim (not at issue here) that the FCC's methodological determinations are invalid on the merits. GTE separately contends (Opp. 24-25) that, because the Eighth Circuit determined in its

number of state commissions profess to have adopted a "forward-looking" methodology (although the proper *form* of that methodology is often a subject of dispute). What the incumbent LECs do not mention, however, is that they and others have attacked the States' methodological choices in dozens of district court proceedings. To date, not one court has resolved any of those challenges on the merits.

So long as the decision below deprives the district courts of regulatory direction from the Commission, those courts—many of which lack familiarity with telecommunications law—must now interpret the core pricing and other provisions of the 1996 Act from scratch when adjudicating challenges to state arbitration decisions. For that reason, unless this Court intervenes now, disputes about those core provisions will proliferate throughout the federal judiciary until, many years from now, the courts of appeals and ultimately this Court address those provisions one by one and determine what they mean. Congress did not intend to subject potential competitors (and the federal courts) to such dilatory, piecemeal litigation. That is why Congress directed the Commission to address the most basic controversies arising under the local competition provisions by August 1996 so that those controversies could be consolidated in a single review proceeding and resolved soon thereafter.

The central dispute here is thus not about "federalism" (GTE Opp. 22), but about the nature and pace of the inevitably federal process of interpreting federal law. In response to that point, respondents contend that Congress

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stay order that the Commission's pricing proxies "were likely to cause incumbents irreparable harm, there is a substantial possibility that the Eighth Circuit will strike down the FCC's pricing rules on the merits." That is not so. GTE mistakes the court's balance-of-equities determination for a determination on the merits, and it mistakes the Commission's temporary and optional "default proxies" (see First Report and Order, ¶ 623) for the Commission's pricing methodology. The court of appeals could not have been clearer in its refusal to address the merits of that methodology. Pet. App. 23a-24a.

may never have wished to ensure national consistency in the implementation of this new federal statute. See, *e.g.*, Regional Bell Opp. 20, GTE Opp. 23. That contention is without merit. Congress is presumed to intend that the laws it enacts will have the same meaning in one part of the country as in another. The federal standards of Sections 251 and 252 have wide-ranging and highly consequential content, and state commissions are not free to interpret that content however they please. To take one example, respondent LECs nowhere deny, and have elsewhere insisted,[4] that Congress did not intend for 50 state commissions to diverge on such basic federal issues as whether interconnection and unbundling rates should be based on forward-looking or embedded costs. See Fed. Pet. 15-16 & n.6. That and other substantive issues arising under the Act must ultimately be decided by the federal courts; in subjecting state arbitration decisions to federal judicial review under Section 252(e)(6), Congress reaffirmed that here, as elsewhere, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The only question is whether the federal courts will decide those core issues on the merits in a single proceeding on direct review of the FCC's rules or, as the incumbent LECs would prefer, in piecemeal litigation stretching well into the next century.[5] The Eighth Circuit chose

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[4] The respondent LECs, which have themselves invoked federal law to challenge numerous state pricing decisions, betray some discomfort with their own position on the proper role of state commissions in implementing federal law. For example, in answering petitioner MCI's argument (MCI Pet. 26) that the court of appeals' construction of the 1996 Act raises serious constitutional concerns about the delegation of federal power, GTE acknowledges that Congress did not intend to "grant[] federal lawmaking authority" to the States. Opp. 15-16 n.7.

[5] Respondent GTE argues that it would now be better for the telecommunications industry to live with the Eighth Circuit's decision, even if it is erroneous, than to correct the error and permit renegotia-

the latter course, and, absent review by this Court, that choice, with all of the anti-competitive uncertainties it creates, will become the permanently binding interpretation of the Act. There will be no second chance to address the fundamental jurisdictional issue presented here.[6] A denial of certiorari would therefore have immense and irreversible significance for the structure of litigation under the 1996 Act and for the future of the $100 billion local telephone market.

2. In addressing the court of appeals' disposition of Rule 315(b), respondents appear to acknowledge that the term "unbundled" has a settled industry meaning, and that it signifies separate pricing for disparate elements rather than physical disconnection of those elements. See Regional Bell Opp. 24-25; GTE Opp. 27-28. Nonetheless, some respondents contend that, read "in the context of the sentence in which it appears," GTE Opp. 28, that term does indeed entail pulling pre-combined elements apart before

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tion of interconnection agreements. See GTE Opp. 24-25. Putting aside the tension between that argument and GTE's assertion that state commissions have largely followed the FCC's regulatory framework, *id.* at 24, GTE's approach would create far more severe and long-lasting disruptions than would correction of the Eighth Circuit's decision in this case. Under that decision, only a handful of the basic controversies arising under the 1996 Act would be resolved on appellate review of the Commission's order; the rest would be subject to incompatible dispositions in the district courts and the regional courts of appeals until this Court resolved each controversy on a piecemeal basis. That approach would *indefinitely* cause repeated disruptions of settled law—and therefore a potential need to renegotiate agreements—on the entire range of issues that the Eighth Circuit has deemed beyond the Commission's jurisdiction.

[6] Without explanation, respondent California asserts (Opp. 13) that "appeals from the rulings of the district courts on arbitration appeals pursuant to [Section] 252(e)(6) will reach the courts of appeals, permitting unfettered review of jurisdictional issues raised in those proceedings despite the Hobbs Act." As we have discussed (Fed. Pet. 23 n.9, 24-25), that is simply incorrect. The court of appeals invalidated, as beyond the scope of the FCC's authority, the Commission's effort to provide a national framework for the core local competition provisions. That decision is not subject to collateral challenge in other proceedings.

new entrants may gain access to them. Only then, they say, is it possible to ensure that new entrants may gain access to elements in a "manner that allows requesting carriers to combine such elements." 47 U.S.C. 251(c)(3).

That is incorrect. The quoted language, from the second sentence of Section 251(c)(3), requires an incumbent LEC to "*allow*" requesting carriers to combine elements if, for example, they wish to connect them in new ways. That requirement, which augments a requesting carrier's more general rights under the first sentence of Section 251(c)(3), does not somehow authorize an incumbent to *compel* carriers invoking those rights to incur the costs of recombining previously joined elements that the incumbent has disconnected simply to thwart competition. Indeed, because incumbent LECs obviously impose no such costs on themselves when connecting new customers to their networks, respondents' interpretation contradicts Section 251(c)(3)'s separate requirement of "nondiscriminatory access" to requested elements.

Because the text of Section 251(c)(3) plainly supports the Commission's interpretation, respondents rely principally on economic arguments that the Commission considered and rejected. Respondents repeat the court of appeals' concern (Pet. App. 71a) that "[t]o permit * * * acquisition of already combined elements at cost based rates" would "obliterate" Congress's "careful distinctions" between unbundled access and resale as methods for competitive entry. That policy concern is baseless. As the Commission explained (Pet. App. 244a-246a), resale of existing retail services (which necessarily excludes exchange access) and unbundled access to network elements represent two quite distinct means of entering local markets, each with its own advantages and disadvantages, which vary with a particular carrier's circumstances and entry strategies. Rule 315(b) poses no danger of "obliterat[ing]" the distinction between those options.

Respondents also argue that, by introducing efficient, cost-based pricing into local markets, Rule 315(b) threat-

ens traditional subsidies for universal service. See Regional Bell Opp. 22; GTE Opp. 27-28. In a provision of the 1996 Act that respondents virtually ignore, however, Congress has addressed that concern by directing replacement of the existing system of hidden universal-service subsidies with a new system that requires equitable contributions from all telecommunications providers. See 47 U.S.C. 254. The proper way to reconcile universal-service concerns with the emergence of competition in local markets is not to erect arbitrary barriers to competition, as respondents propose, but to begin implementing Section 254, as the Commission has in fact done in a separate proceeding.

In sum, the court of appeals' invalidation of Rule 315(b)—like its invalidation of the Commission's "pick and choose" rule implementing 47 U.S.C. 252(i) (see Fed. Pet. 28-30; see also AT&T Pet. 28-30)—misreads the text of the 1996 Act and disregards the congressional economic judgment underlying that text. The court thus ignored its duty under *Chevron* to defer to the Commission's delegated authority to implement the substantive terms of federal telecommunications law.[7]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[7] Some respondents ask this Court (*e.g.*, California Opp. 8-10) to deny review of Rule 315(b) on the theory that the court of appeals' interpretation of Section 251(c)(3) does not necessarily preempt the authority of state commissions to implement similar requirements as a matter of *state* law. At the same time, however, respondent LECs argue "vigorously" (Regional Bell Opp. 27) that the court's decision has preemptive effect and is thus (absent further review by this Court) irreversibly binding in state commission proceedings. There is also no merit to any suggestion (see Regional Bell Opp. 28) that this Court might have an opportunity to address Rule 315(b) again after the Eighth Circuit resolves challenges to the Commission's *Third Reconsideration Order*. That review proceeding involves the designation of "shared transport" as a single network element and does not revive issues involving the validity of Rule 315(b).

Respectfully submitted.

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